

**LETTER OPINION
2002-L-18**

March 26, 2002

Honorable Aaron Krauter
State Senator
HC1, Box 27
Regent, ND 58650-9721

Dear Senator Krauter:

Thank you for your letter asking if the city of Reeder may make a below market value sale of a parcel of its real property to Dakota Prairie Enrichment Center, Inc., a nonprofit corporation, and whether the city may enter into a long-term lease of a parcel of its real property to the nonprofit corporation. I understand that Reeder is not a home rule city under N.D.C.C. ch. 40-05.1; therefore, I will respond to your questions only as they relate to cities that do not have home rule authority.

Cities have the power to “convey, sell, dispose of, or lease personal and real property” of the city. N.D.C.C. §40-05-01(56). The sale of city-owned realty is regulated by the following statutory provisions:

40-11-04. Ordinance required for the transfer of property.

Every municipality shall enact an ordinance providing for the conveyance, sale, lease, or disposal of personal and real property of the municipality. When the property to be disposed of is estimated by the governing body of the municipality to be of a value of less than two thousand five hundred dollars, the property may be sold at private sale upon the proper resolution of the governing body. In all other cases, the property may be sold only at public sale or as provided under section 40-11-04.2.

40-11-04.1. Real property transfer requirements. Upon resolution by the governing body of a city authorizing the public sale of real property, a notice containing a description of the property to be sold and designating the place where and the day and hour when the sale will be held shall be published in the city’s official newspaper as provided in section 40-01-09 once each week for two consecutive weeks with the last publication being at least ten days in advance of the date set for the sale.

The notice shall specify whether the bids are to be received at auction or as sealed bids as determined by the governing body of the city. The property advertised shall be sold to the highest bidder if his bid is deemed sufficient by a majority of the members of the governing body.

40-11-04.2. Transfer of real property by nonexclusive listing agreements. As an alternative to the procedure established under section 40-11-04.1, the governing body of a city may by resolution describe the real property of the city which is to be sold; provide a maximum rate of fee, compensation, or commission; and provide that the city reserves the right to reject any and all offers determined to be insufficient. After adoption of the resolution, the governing body of a city may engage licensed real estate brokers to attempt to sell the described property by way of nonexclusive listing agreements.

N.D.C.C. §§ 40-11-04, 40-11-04.1, 40-11-04.2.

Thus, for a city to convey its real property, it must first have an ordinance on the subject. The ordinance must be consistent with the provisions of the three above-cited sections of law, and the sale must comply with the requirements of the ordinance. 1995 N.D. Op. Att'y Gen. L-83. If the real property to be disposed of is estimated by the city governing body to be of a value of less than \$2,500, the real property may be sold at a private sale. Otherwise, the real property must be sold at a public sale or through a licensed real estate broker by way of a nonexclusive listing agreement.

In addition to the requirements discussed above, a city must also comply with the anti-gift provision in the state Constitution which provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, . . . but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

N.D. Const. art. X, § 18. In part, this constitutional provision means that “making loans or giving credit [or making donations] may be done in connection with the city’s engaging in any permissible industry, enterprise, or business, but not otherwise.” Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964).

Cities have only those powers expressly conferred upon them by the Legislature or those necessarily implied from the powers expressly granted. Parker Hotel Co. v. City of Grand Forks, 177 N.W.2d 764, 768 (N.D. 1970). Thus, whether a city has the authority to make a below market value sale of a parcel of its real property to a nonprofit corporation depends upon whether a city is authorized by statute to engage in an industry, enterprise, or business through which a below market value sale to a nonprofit corporation may be made. See Letter from Attorney General Nicholas Spaeth to Charles Isakson (Sept. 29, 1992) (a political subdivision may not make a donation without specific statutory authority or a statute from which that authority can be necessarily implied); 1993 N.D. Op. Att'y Gen. F-06 (whether a city has the authority to make home improvement loans to its residents depends upon whether a city is authorized by statute to engage in an industry, enterprise, or business through which home improvement loans to its residents may be made).

I have reviewed a city's authority under state law. In my opinion, there is no statutory authority that would authorize the city of Reeder to make a below market value sale of a parcel of its real property to the Dakota Prairie Enrichment Center, Inc., a nonprofit corporation. See 1985 N.D. Op. Att'y Gen. F-14 (no statutory authority for a city to contribute money to a private nonprofit corporation which is constructing a civic facility not to be owned or controlled by the city).

Cities have the authority to lease real property. N.D.C.C. § 40-05-01(56). As with a sale, for a city to lease its real property, it must have an ordinance on the subject. N.D.C.C. § 40-11-04. The matter of leasing city realty is also regulated by the following two sections of law:

48-08-06. Lease of public buildings - Authorized. The governing body of any county, city, or township may permit the use of or may lease any public building or any part of a public building under its charge for any legal purpose, giving equal opportunity to all persons, and without religious or political distinctions, and may make such reasonable rules and restrictions on the use of such building as may seem necessary, and shall fix proper rentals and fees for such use. Such governing body, in its discretion, may require a bond from the lessee or user of such building, conditioned upon the payment of charges made for such lease or use and indemnifying the county, city, or township against damage or destruction of or to such building or any part thereof.

48-08-07. Lease of public buildings - Terms. No lease of any public building or part of any public building under the provisions of section 48-08-06 may be for a longer term than two years, except as may be otherwise provided by city ordinance or by resolution of the board of

county commissioners. Such lease must be to a responsible party offering the highest return to the political subdivision and the use or occupation of the building may not interfere with the use of such building for public purposes. The governing body may reserve the right to reject any and all bids.

N.D.C.C. §§ 48-08-06, 48-08-07.

These two state laws authorize a city governing body to lease any public building or part of a public building to another entity only under certain conditions. The city must give equal opportunity to all persons to lease, and the lease must be to a responsible party offering the highest return to the city. The lease term cannot be longer than two years, unless a city ordinance provides otherwise.

Thus, if the city complies with N.D.C.C. §§ 48-08-06 and 48-08-07, the nonprofit corporation offers the highest return to the city, and the city passes an ordinance providing for a long-term lease, then the city may enter into a long-term lease of a parcel of its real property to the nonprofit corporation.

Sincerely,

Wayne Stenehjem
Attorney General

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